GUANGXI DEV & CAP SDN BHD v. SYCAL BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
HASNAH MOHAMMED HASHIM JCA
HARMINDAR SINGH DHALIWAL JCA
[CIVIL APPEALS NO: B-02(C)(A)-716-04-2017 &
B-02(C)(A)-717-04 2017]
18 SEPTEMBER 2018

CONSTRUCTION LAW: *Adjudication – Setting aside – Application to set aside decisions of adjudicator – Adjudicator rejected applicant's application to call expert witnesses – Whether applicant deprived of opportunity to present complete defence – Whether there was denial of natural justice in adjudication proceedings – Construction Industry Payment Adjudication Act 2012, ss. 15, 25*

The appellant appointed the respondent as the design and build contractor as well as the design consultant for a project ('the project'). The appellant and the respondent entered into a formal contract ('the contract'). Disputes, however, arose between the parties. The appellant commenced arbitration proceedings in relation to the contract works *vide* its notice to arbitrate. Adjudication proceedings were later commenced by the respondent against the appellant under the Construction Industry Payment Adjudication Act 2012 ('CIPAA 2012'). The first adjudication decision determined, *inter alia*, that the appellant pay the respondent the sum of RM9,514,017 while the outcome of the second adjudication decision was that the appellant, *inter alia*, pay the respondent the sum of RM5,760,578.66. The respondent then applied for enforcement of the adjudication decisions in the High Court. The appellant, at the same time, filed two applications to set aside the said adjudication decisions under s. 15 CIPAA 2012 in the High Court. The appellant's setting aside applications were dismissed by the High Court and the respondent's enforcement applications were allowed. The appellant thus filed appeals against the dismissal of the setting aside applications by the High Court. In essence, the complaint of the appellant was that the adjudicator in rejecting the appellant's application to call its three expert witnesses had deprived the appellant of an opportunity to present a complete defence against the respondent's claims which was necessary for a just decision on the facts of the case. The issue in the instant appeal was therefore confined to whether there was a denial of natural justice in the adjudication proceedings.

Held (allowing appeals)
Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:

(1) Any application for an oral hearing must be considered on its merits. The power to do so can be found in s. 25 CIPAA 2012. A request for an oral hearing could not be denied purely on the ground that time was limited especially in a case where the application to do so had been made at the earliest opportunity. The request for an oral hearing in the instant case was made one day after the service of the adjudication reply. So there was ample time to conduct the hearing which hearing could be limited by the adjudicator as the case demanded. (paras 24 & 25)

(2) Any hearing concluded without a full consideration of a party's case would not inspire confidence in the adjudication process. Looking at the grounds available under s. 15 CIPAA 2012, the adjudication decision could not be reviewed on merits. There is no appeal and the finding of facts by the adjudicator could not be challenged. It was therefore of great importance that all assertions put forward in opposing an adjudication claim be considered in the adjudication proceedings. The adjudicator is obligated to consider all defences raised by a respondent in the adjudication response. If the adjudicator failed to do so, he or she did not properly perform the task which he or she had been appointed to do and could be said to have not acted in accordance with natural justice. (paras 28 & 30)

(3) In the instant case, a preliminary report prepared by the appellant's expert witness was submitted, which concluded, amongst others, that the basis of the valuation as well as the assessed and certified amounts in the payment certificates issued by the architect were erroneous given that there were too many incomplete works and those works that were completed did not conform to the specifications and the building laws. Furthermore, in cl. 8(d) of the letter of award, the appellant had reserved the absolute right to correct or rectify any errors or mistakes in previous progress payments. There were at least some technical issues which warranted fair consideration. In the circumstances, it would be hard to argue against there being no possibility of the adjudicator coming to a different conclusion. The decision by the adjudicator therefore could not stand (paras 33-35)

Bahasa Malaysia *Headnotes*

Perayu melantik responden sebagai kontraktor membina dan mereka bentuk serta sebagai perunding reka bentuk untuk sebuah projek ('projek'.) Perayu dan responden memasuki satu kontrak rasmi ('kontrak'). Walau bagaimanapun, pertikaian timbul antara pihak-pihak. Perayu memulakan prosiding timbang tara berhubungan kerja-kerja kontrak melalui notis timbang tara. Satu prosiding adjudikasi kemudiannya dimulakan oleh

responden terhadap perayu bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('CIPAA'). Adjudikasi pertama, memutuskan, antara lain, bahawa perayu membayar responden sejumlah RM9,514,017 sementara hasil keputusan adjudikasi kedua adalah perayu, antara lain, harus membayar responden jumlah RM5,760,578.66. Responden kemudiannya memohon penguatkuasaan keputusan-keputusan adjudikasi di Mahkamah Tinggi. Perayu, pada waktu yang sama, memfailkan dua permohonan untuk mengetepikan keputusan-keputusan adjudikasi bawah s. 15 CIPAA 2012 di Mahkamah Tinggi. Permohonan-permohonan pengetepian perayu ditolak oleh Mahkamah Tinggi dan permohonan penguatkuasaan oleh responden dibenarkan. Oleh itu, perayu memfailkan rayuan-rayuan terhadap penolakan permohonan pengetepian oleh Mahkamah Tinggi. Pada dasarnya, aduan perayu adalah adjudikator, dalam menolak permohonan perayu untuk memanggil tiga saksi pakar, telah menafikan perayu peluang untuk membentangkan pembelaan yang lengkap terhadap tuntutan-tuntutan responden yang diperlukan untuk mencapai keputusan yang adil atas fakta-fakta kes. Isu dalam kes ini adalah sama ada terdapat penafian keadilan asasi dalam prosiding adjudikasi.

Diputuskan (membenarkan rayuan-rayuan)
Oleh Harmindar Singh Dhaliwal HMR menyampaikan penghakiman mahkamah:

(1) Permohonan untuk perbicaraan lisan harus dipertimbangkan atas merit. Kuasa untuk berbuat demikian terkandung dalam s. 25 CIPAA 2012. Permintaan untuk perbicaraan lisan tidak boleh dinafikan hanya atas alasan bahawa masa terhad terutama sekali dalam kes di mana permohonan berbuat demikian telah dibuat pada peluang yang paling awal. Permintaan perbicaraan lisan dalam kes ini dibuat sehari selepas penyerahan balasan adjudikasi. Oleh itu, terdapat masa yang memadai untuk menjalankan perbicaraan di mana perbicaraan boleh dihadkan oleh adjudikator seperti yang dituntut kes.

(2) Perbicaraan yang disimpulkan tanpa mengambil kira kes sesuatu pihak sepenuhnya tidak akan membangkitkan keyakinan dalam proses adjudikasi. Melihat pada alasan-alasan yang sedia ada bawah s. 15 CIPAA 2012, keputusan adjudikasi tidak boleh disemak atas merit. Tidak akan ada rayuan dan dapatan fakta-fakta oleh adjudikator tidak boleh dicabar. Oleh itu, adalah penting untuk segala kenyataan yang diutarakan dalam membantah tuntutan adjudikasi diambil kira dalam prosiding adjudikasi. Adjudikator mempunyai kewajipan untuk mempertimbangkan segala pembelaan-pembelaan yang dibangkitkan oleh seorang responden dalam balasan adjudikasi. Jika adjudikator gagal berbuat demikian, adjudikator itu tidak melaksanakan tugasnya dengan betul dan boleh dikatakan tidak bertindak sejajar dengan keadilan asasi.

(3) Dalam kes ini, laporan awalan yang disediakan oleh saksi pakar perayu yang diserahkan, telah menyimpulkan, antara lain, bahawa asas penilaian serta amaun-amaun ditaksir dan diperakui dalam sijil bayaran yang dikeluarkan oleh arkitek adalah salah kerana terdapat terlalu banyak kerja-kerja yang belum selesai dan kerja-kerja yang diselesaikan tidak mematuhi penentuan-penentuan dan undang-undang bangunan. Tambahan lagi, dalam kl. 8(d) surat tawaran, perayu telah mengekhaskan hak mutlak untuk membetulkan atau memperbaiki apa-apa kesalahan atau kesilapan dalam bayaran kemajuan sebelumnya. Terdapat beberapa isu-isu teknikal yang mewajarkan pertimbangan adil. Oleh itu, keputusan adjudikator tidak boleh dipertahankan.

Case(s) referred to:

Cantillon Ltd v. Urvasco Ltd [2008] EWHC 282 (TCC) ***(refd)***
CJP Builders Ltd v William Very Ltd [2008] EWHC 2025 (TCC) ***(refd)***
Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Case [2017] 1 CLJ 101 HC ***(refd)***
Quartzelec Ltd v. Honeywell Control Systems Ltd [2008] EWHC 3315 (TCC) ***(refd)***
View Esteem Sdn Bhd v. Bina Puri Holdings Sdn Bhd [2017] 1 CLJ 677 CA ***(refd)***
View Esteem Sdn Bhd v. Bina Puri Holdings Sdn Bhd [2017] 1 LNS 1378 FC ***(refd)***

Legislation referred to:

Construction Industry Payment and Adjudication Act 2012, ss. 15(b), 25(g)

For the appellant - Firoz Hussein, Frank Loh, Choo Shi Jin & Elina Lim; M/s Stanley Chang & Partners
For the respondent - Wong Hin Loong, Esther Chow Ruen Xin & Shafrina Shahidan; M/s Azman Davidson & Co

[Editor's note: Appeal from High Court, Shah Alam; Originating Summons No: BA-24C -31-12/2016 & BA-24C-32-12-2016 (overruled)]

Reported by Suhainah Wahiduddin

JUDGMENT

Harmindar Singh Dhaliwal JCA:

[1] There are two appeals before us. They emanate from the orders of the Shah Alam High Court dated 9 March 2017. The plaintiff in the High Court, and the appellant here, had filed two applications to set aside two adjudication decisions which were delivered pursuant to the Construction Industry Payment and Adjudication Act 2012 ("CIPAA 2012"). The applications were dismissed by the High Court.

[2] Aggrieved with the decision, the appellant filed the instant appeals. After hearing the parties and taking into consideration the written submissions, we allowed the appeals and set aside the orders of the High Court. Our reasons for doing so now follow and will constitute the judgment of the court.

Background Facts

[3] By a letter of award dated 2 November 2011, the appellant appointed the respondent as the design and build contractor for a project known as "Cadangan Pembangunan Gated Komuniti 18 Tingkat yang Mengandungi (a) 252 unit Kondominium (Tingkat 4-17); (b) Tempat Letak Kereta Bertingkat (Tingkat Bawah - Tingkat 3); (c) 3 unit Kedai Serbaguna, (Tingkat Bawah); (d) Kemudahan Awam iaitu Dewan Serbaguna, Tadika, Surau, Kolam Renang & Taman Permainan Kanak-kanak; (e) 1 unit Pencawang Elektrik (f) 2 unit Pondok Pengawal di atas Lot HS(D) 46211, No. PT27424, Mukim Ampang, Daerah Ulu Langat, Negeri Selangor ("the project"). The contract sum stated in this letter of award was RM65,966,227.13.

[4] By a separate letter of award dated 28 November 2011, the appellant appointed the respondent as the design consultant for the project. The contract sum stated in this letter of award was RM2,187,419.43. The respondent's scope of works as the design consultant included architectural design, geotechnical design, civil & structural design, mechanical & electrical design, landscaping design and quantity surveying consultancy works.

[5] By another letter of award dated 15 December 2011, the appellant awarded additional works to the respondent for a total lump sum of RM9,415,597.51. The scope of works under this letter of award included changes to the structural and architectural works for the project.

[6] On or around 30 January 2013, the appellant and the respondent entered into a formal contract. The contract is based on the standard PAM Conditions of Contract 2006 (Without Quantities) ("the contract"). The contract sum was RM78,199,244.07.

[7] Disputes, however, arose between the parties. The appellant commenced arbitration proceedings in relation to the contract works *vide* its notice to arbitrate dated 23 May 2015. Adjudication proceedings were later commenced by the respondent against the appellant under CIPAA 2012, namely, under adjudication reference No. KLRCA/D/ADJ-0411-2016 by Ms Samrith Kaur as adjudicator ("the first adjudication"); and under Adjudication Reference No. KLRCA/D/ADJ-0436-2016 by Ms Louise Jacqueline Azmi as adjudicator ("the second adjudication").

[8] In respect of the first adjudication, the adjudication decision was dated 16 November 2016 (amended on 5 December 2016), which determined as follows:

(i) The appellant to pay the respondent the sum of RM9,514,017 ("the first adjudication amount") within four weeks from the adjudication decision;

(ii) The appellant shall pay to the respondent the late payment interest at 7.60% per annum (Maybank base lending rate at 6.6% plus 1%) for the amount certified under payment certificate No. 24 and No. 28 from the due date for each payment certificate until the full and final settlement of the certified amount;

(iii) The appellant shall pay to the respondent the late payment interest at 7.85 per annum (Maybank base lending rate at 6.85% plus 1%) for the amount certified under payment certificates No. 40 to 45 from the due date for each payment certificate until the full and final settlement of the certified amount; and

(iv) The appellant shall bear the full costs of adjudication amounting to RM167,567.56.

[9] And the outcome of the second adjudication by an adjudication decision dated 18 November 2016, was as follows:

(i) Appellant to pay the respondent the sum of RM5,760,578.66 ("the second adjudication amount") on/before 16 December 2016;

(ii) Appellant to pay the respondent interest in the sum of RM203,182.71; and

(iii) Appellant to bear and pay the adjudication costs to the respondent in the sum of RM137,049 on/before 16 December 2016.

[10] The respondent then applied for enforcement of the adjudication decisions in the High Court through the following actions:

(i) The first adjudication decision in Originating Summons No: BA-24C-2-01/2017; and

(ii) The second adjudication decision in Originating Summons No: BA-24C-1-01/2017.

[11] The appellant, at the same time, filed two applications for a setting aside of the said adjudication decisions under s. 15 of the CIPAA 2012 in the High Court through the following actions which are the subject-matter of the instant appeal:

(i) The first adjudication decision in Originating Summons No: BA-24C-31-01/2017; and

(ii) The second adjudication decision in Originating Summons No: BA-24C-32-01/2017.

[12] On 9 March 2017, after a hearing, the appellant's setting aside applications were dismissed by the High Court. The respondent's enforcement applications were allowed. The appellant then filed appeals against the dismissal of the setting aside applications by the High Court.

At The High Court

[13] At the High Court, the parties had agreed that the decision in Originating Summons BA-24C-31-12/2016 ("OS 31") will bind the outcome of Originating Summons BA-24C-32-12/2016 ("OS 32"). This is borne out in the judgment of the learned judge at para. 2. This meant that it was the adjudication decision of the adjudicator Ms Samrith Kaur that became the object of challenge in the High Court. Accordingly, there was no separate grounds of decision for OS 32.

[14] The adjudication decision was sought to be set aside on the ground of denial of natural justice as provided in s. 15(b) of CIPAA 2012. The appellant had contended that there had been a denial of natural justice when the application to call three expert witnesses to give evidence in the adjudication proceedings was rejected by the adjudicator. Not allowing the said witnesses to be called, it was asserted, deprived the appellant of a complete defence to the claim.

[15] In coming to her decision, the learned judge relied on this court's decision in *View Esteem Sdn Bhd v. Bina Puri Holdings Sdn Bhd* [2017] 1 CLJ 677 (recently overturned by the Federal Court) and observed that the backdrop to CIPAA 2012 was to facilitate regular and speedy payment through the speedy adjudication process. The learned judge held that there had been no denial of natural justice as the reasons advanced by the appellant had been duly considered and the adjudicator had made findings of fact and law. The learned judge also held that even if there had been denial of natural justice, it was not decisive in that the decision of the adjudicator would not have been different.

The Instant Appeal

[16] Before us, the decision of the High Court was assailed by the appellant on a number of grounds. These grounds were summarised by the appellant in the following fashion:

(i) That the learned High Court Judge had erred in law and fact in dismissing the appellant's setting aside application of the adjudication decisions in failing to consider that the appellant has an "absolute right" provided in the design and build contract under the letter of award dated 2 November 2011, cl. 8(d); and

(ii) The learned High Court Judge had erred in law and fact in dismissing the appellant's setting aside application of the adjudication decisions in deciding that there was no breach of natural justice in the adjudication decisions in refusing the appellant a hearing of the appellant's expert witness, therefore depriving the appellant's rights under the letter of award, and the opportunity to present a complete defence, in violation of the principle of natural justice.

[17] In essence, the complaint of the appellant was that the adjudicator in rejecting the appellant's application to call its three expert witnesses had deprived the appellant of an opportunity to present a complete defence against the respondent's claims which was necessary for a just decision on the facts of the case. The issue in the instant appeal is therefore confined to whether there was denial of natural justice in the adjudication proceedings.

[18] It must be observed at the outset that an adjudication decision can only be set aside on the grounds stated in s. 15 of the CIPAA 2012. Section 15 of the CIPAA 2012 states as follows:

> Improperly procured adjudication decision
>
> 15. An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:
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> (a) the adjudication decision was improperly procured through fraud or bribery;
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> (b) there has been a denial of natural justice;
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> (c) the adjudicator has not acted independently or impartially; or
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> (d) the adjudicator has acted in excess of his jurisdiction.

[19] As mentioned earlier, the appellant is relying only on the ground of denial of natural justice. The principles of natural justice are rooted in the right to a fair hearing. There is substantial authority for the proposition that a fair hearing means the right to be heard which would include a fair opportunity to present evidence and arguments before a tribunal makes its decision (see *CJP Builders Ltd v William Very Ltd* [2008] EWHC 2025 (TCC)).

[20] The principles of natural justice in relation to adjudication decisions have been deliberated upon in a number of cases. However, for the purposes of this appeal, we need only refer to the recent decision of the Federal Court of *View Esteem Sdn Bhd v. Bina Puri Holdings Sdn Bhd* [2017] 1 LNS 1378 which was also a decision in the context of setting aside an adjudication decision. In relation to the issue of natural justice, the following observation of the Federal Court through the judgment of Zulkefli Ahmad Makinudin PCA is pertinent:

> [64] It follows that the "duty and obligation of the adjudicator" as spelt out in section 24(c) of CIPAA that "he shall comply with the principles of natural justice" would oblige him to consider all the defences raised by the appellant in its adjudication response as a matter of fairness and impartiality.
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> [65] We are of the view that an Adjudicator who wrongly rules out considering a defence presented to him would be in breach of natural justice. This point arose in *Pilon Ltd v. Breyer Group Pic* [2010] EWHC 837 (TCC) which like in our present case was concerned with progress claims that were cumulative in nature. The decision by Justice Coulson bears close reading. At [24-28] the learned Judge observed:

24. It seems to me clear beyond doubt that the adjudicator erred in failing to take into account *Breyer*'s defence by reference to the overpayment on batches 1-25. Whilst he was quite correct to regard the notice of adjudication as setting out the boundaries of his jurisdiction, he failed to appreciate that what *Pilon* were seeking by that notice was not only an interim valuation of batches 26-62, but also an interim payment of any sum considered owing to them ...

25. It is not uncommon for adjudicators to decide the scope of their jurisdiction solely by reference to the words used in the notice of adjudication, without having regard to the necessary implications of the words ...

26. As a result, an adjudicator should think very carefully before ruling out a defence merely because there was no mention of it in the claiming party's notice of adjudication. That is only common sense: it would be absurd if the claiming party could, through some devious bit of drafting, put beyond the scope of the adjudication the defending party's otherwise legitimate defence to the claim.

27. I understand that it may be tempting for a claiming party in an adjudication to seek to limit the adjudicator's jurisdiction in a way in which that party believes to be to its advantage ... It was their case that the over-payment claim was outside the adjudicator's jurisdiction, and that is what they (successfully) urged on the adjudicator. Thus, this is a case where *Pilon* sought a tactical advantage by putting forward an erroneous statement of the adjudicator's jurisdiction and, as the decision in *Quartzelec* shows that can be a dangerous tactic to adopt.

28. In the result therefore, I consider that the adjudicator deliberately placed an erroneous restriction on his own jurisdiction, which amounted to a breach of natural justice ... .

[66] Based on the above decision of *Pilon Ltd* the adjudicator had likewise in our case, wrongly construed the scope of his jurisdiction under s. 27(1) of CIPAA in refusing to consider all the defences raised in the adjudication response. Therefore such a decision by the adjudicator cannot stand ...

[74] For the reasons above stated it is our considered view that an Adjudicator is not excluded from considering all the defences raised by a respondent in the Adjudication Response whether found in the first response under section 6 of CIPAA or not. In the circumstances of this case, the Adjudicator had acted in breach of natural justice in excluding and refusing to consider certain defences raised by the appellant and his decision cannot stand for that reason.

[21] Now, the adjudicator in question, Ms Samrith Kaur, and the learned judge, relied on the same *View Esteem* decisions but not that of the Federal Court. To be fair, no criticism can be levelled here as the Federal Court decision overturning the High Court and Court of Appeal decisions came later.

[22] In the event, the adjudicator came to the view that there was no need for the expert witnesses to give evidence for several reasons. Firstly, she took into account the time limited under CIPAA 2012 for the adjudicator to deliver the decision. Secondly, she considered that the matter had already been referred to arbitration and no prejudice would be caused as the said witnesses could be called in the arbitration proceedings. Thirdly, she also considered that notwithstanding the earlier reasons, the defence of disputing the payment certificates was not raised in the payment response and as such cannot be considered.

[23] The following is how the adjudicator put it (from paras. 84 onwards in the adjudication decision):

> 84. Contrary to paragraph 80 above, if I erred in my finding that the letter dated 20.05.2016 does not constitute a Payment Response but stretch the argument to say that as long as the Respondent disputed and raised some issues in the Payment Response, as the Respondent did in this present case as in items (a) to (e) it is sufficient to constitute a Payment Response, then the next huddle (*sic*) with regards to deciding on paragraph 83(1) hereinabove, is whether the Respondent in raising the contention in the said paragraph is within the confines of the Payment Response?
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> 85. Upon analysing the Letter dated 20.5.2016/Payment Response, the Respondent's contention of non-compliance with the approved designs, approved building plans, approved construction drawings and the relevant laws was not raised in the Payment Response. What was raised is that the Respondent is "disputing the works executed and that you failed completely to rectify the defects works". The issue on the non-compliance to the approved design, plans and or drawings was never raised in the Payment Response. According to the High Court case of *View Esteem Sdn Bhd v Bina Purl Holdings Sdn Bhd* [2014] MLJU 695, the Court held that Parties are bound by their pleadings i.e. the Payment Claim and the Payment Response in adjudication matter and hence not entitled to raise additional defence in the Adjudication Response. Therefore, I am bound by the High Court decision in and further, I am confined to decide within matters referred to adjudication by the parties pursuant to Section 5 and 6 of CIPAA 2012.
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> 86. Further, I note that the finding in the Report was done after the Payment Claim was served on the Respondent. The Respondent failed to show that it had prior to 11.08.2016 raised the issue of non-compliance with the Claimant. Although the Letters dated 11.08.2016 (Exhibit 2 of the Adjudication Response) addressed to the Claimant are for remedial works, the Defect Liability Period expires only on 19.08.2017, hence this claim is pre-mature. In addition to the failure of the Respondent to prove total damages suffered I agree with the Claimant that this is not the right forum to deal with the findings in the Report.

[24] In this respect, we agree that any application for an oral hearing must be considered on its merits. The power to do so can be found in s. 25 CIPAA 2012. A request for an oral hearing cannot be denied purely on the ground

that time is limited especially in a case where the application to do so had been made at the earliest opportunity. If all applications for an oral hearing are rejected on the timeline argument, then the power to order oral hearings under s. 25(g) of CIPAA 2012 would be rendered illusory.

[25] We would also observe that unlike the case of *Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Case* [2017] 1 CLJ 101 where the request for an oral hearing was made six days before the dateline to deliver the adjudication decision, the request for an oral hearing in the instant case was made one day after the service of the adjudication reply. So there was ample time to conduct the hearing which hearing can be limited by the adjudicator as the case demands. Instead of conceding to an oral hearing, the adjudicator could also order parties to put in written submissions with documents included as was done in the *Martego* case.

[26] In this regard, we were fully conscious that CIPAA 2012 has been formulated to provide summary relief for payment in the construction industry. It seeks to facilitate regular and timely payment in respect of construction contracts to offset the problem of cash flow in the industry which in the end can be damaging to the economy of the country.

[27] The CIPAA 2012 was enacted to protect the interests of sub-contractors who were at the mercy of the main contractors and owners of construction projects. The task of the adjudicator was to provide a fair interim solution to prevent contractors, who had a valid claim being improperly withheld, from being forced into liquidation. It is common knowledge that prompt payment can often be the lifeblood for sub-contractors, which payment may often be crucial in preventing building projects from stalling or being abandoned to the detriment of many. Given these objectives, it will only be in rare circumstances that the courts will interfere with the decision of the adjudicator.

[28] Even so, it cannot be gainsaid that speedy relief at the expense of a fair hearing will be counter-productive. Any hearing concluded without a full consideration of a party's case will not inspire confidence in the adjudication process. Looking at the grounds available under s. 15 of the CIPAA 2012, it is plain that the adjudication decision cannot be reviewed on merits. There is no appeal and the findings of facts by the adjudicator cannot be challenged. It is therefore a matter of great importance that all assertions put forward in opposing an adjudication claim be considered in the adjudication proceedings. In short, the respondent must be permitted to show why it is entitled to withhold payment.

[29] In the premises, it was not a convincing argument that such witnesses could be called in the arbitration proceedings as the appellant would have to pay out in excess of RM10 million without having its arguments fully ventilated and decided upon.

[30] In any event, the refusal of the adjudicator to consider the defence, or at least the preliminary report, on the basis that it was not raised in the payment response goes against the Federal Court decision in *View Esteem*. The law as it stands now is that the adjudicator is obligated to consider all defences raised by a respondent in the adjudication response. If the adjudicator fails to do so, he or she does not properly perform the task which he or she has been appointed to do and can be said to have not acted in accordance with natural justice (see *Quartzelec Ltd v. Honeywell Control Systems Ltd* [2008] EWHC 3315 (TCC) at para. 31).

[31] Although the law may have been different at the time the adjudication decision was made and the adjudicator and the learned judge were bound by that existing law, it is futile to now support any such decision which goes against the current law. Earlier cases which have been disposed of cannot be resurrected but pending cases will have to be decided based on the current law.

[32] This brings us to the final issue of whether the breach of natural justice was a material breach. It is accepted law that any breach of natural justice must not be peripheral but must be a material breach affecting the outcome of the resolution of the dispute (see *Cantillon Ltd v. Urvasco Ltd* [2008] EWHC 282 (TCC). However, in determining this question, it is not necessary to investigate all the facts to decide if the adjudicator would have arrived at a different conclusion if the matters included in the response were considered. All that needs to be considered is whether there was a real possibility of a different conclusion (see *CJP Builders Ltd v. William Verry Ltd* [2008] EWHC 2015 (TCC)).

[33] In the instant case, a preliminary report dated 29 August 2016 prepared by the appellant's expert witness was submitted. The report concluded, amongst others, that the basis of the valuation as well as the assessed and certified amounts in the payment certificates issued by the architect were erroneous given that there were too many incomplete works and those works that were completed did not conform to the specifications and the building laws.

[34] Furthermore, in cl. 8(d) of the letter of award dated 2 November 2011, the appellant had reserved the absolute right to correct or rectify any errors or mistakes in previous progress payments. There were at least some technical issues which warranted fair consideration. In the circumstances, it would be hard to argue against there being no possibility of the adjudicator coming to a different conclusion.

Conclusion

[35] In the circumstances, and for the reasons provided, we were persuaded that the decision by the adjudicator cannot stand. As agreed by the parties that the decision in Appeal 717 will bind Appeal 716 in accordance with the agreement by the parties in the High Court, both appeals were allowed with costs. The orders made by the High Court were set aside. Accordingly, the appellant's application to set aside the adjudication decisions in both appeals was allowed. The respondent was ordered to pay the appellant the sum of RM70,000 as costs here and below subject to payment of allocatur fees. Deposits to be refunded.